Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

Tammy McGovern,
Petitioner
v.
Monti and Ann McGovern,
Respondent

On Petition For Writ Of Certiorari
To The Arizona Supreme Court

PETITION FOR WRIT OF CERTIORARI

Paul S. Rowley
Counsel of Record
Roberts & Rowley, Ltd.
63 E Main St., Suite 501
Mesa, Arizona 85201
480-833-1113

Questions

The following two questions are the result of a grandparent visitation litigation where the trial court declared that it had violated due process in applying Arizona law to the parent. The court then vacated it's previous orders granting visitation and returned parental control to the fit parent. Subsequently the Arizona Appeals Court, Division Two upheld the court's finding that the parent had been denied due process but remanded the case for a new trial.

1. When a case, involving a fit parent, is remanded for a new trial due to previous failure of the trial court to provide the parent due process does the new trial become such a burden on the parent, family, and parental rights that the new trial constitutes a further violation of due process?

2. Did the Arizona Appeals Court, Division Two, in refusing to grant a stay of the new trial, as anticipated under its own rules, pending the outcome of this petition to the United States Supreme Court further violate due process of the parent by inhibiting her access to appeals allowed by law?

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Kyle O. v. Donald R., 85
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Citations of the Published and Unpublished Opinions in this Case

May 7, 1999 Temporary Vistation Order Pima County Superior Court

April 10, 2000 Order by Minute Entry signed by Judge Adam

June 21,2000 Order granting temporary stay of visitation signed by Judge Adam

August 28, 2000 Order by Minute Entry Signed by Judge Adam

October 11, 2001, Opinion by Arizona Appeals Court, Division II

February 14,2002, Denial of Petition for Review Arizona Supreme Court

March 26, 2002 Denial of Stay of Mandate pending United States Supreme Court Review

April 10,2002 Order setting remand trial date as May 28th, 2002, signed by Judge Adam

Statement of Jurisdiction

On February 14, 2002, the Arizona Supreme Court, without comment, denied a petition to review a earlier published opinion by Division Two or the Arizona Court of Appeals in the case of McGovern v. McGovern, CV-01-0410-PR. The petition of review resulted from an opinion, 2 CA-CV 01-0016 in this same case dated October 11, 2001. This in turn resulted from an appeal from a minute entry by the Pima County Superior Court, D-125189, the Honorable Karen Adam dated August 28, 2000. The United States Supreme Court has jurisdiction in this matter under Rule 11(c).

> "(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or[and] has decided and important federal question in a way that conflicts with relevant decisions of this Court." [added by Petitioner to clarify the claim]

It is the Petitioner contention that the ruling of the Arizona Court of Appeals, Division Two (review denied by the Arizona Supreme Court) has. in part, denied her right to due process as defined under the Fourteenth Amendment of the United States Constitution and the portion of this ruling that remands the case for a new trial should be reversed. It is clear

that, at least with the instant case, no Arizona Court is willing to defend or recognize the massive burden that continuing litigation heaps on a fit parent trying to raise her child free from the burden of continuous state instituted litigation.

Further the Petitioner believes the Court of Appeals, Division Two has *de facto,* by denying a routine stay to permit this petition for Certiorari to this Court, attempted to prevent her from placing this matter before this Court for its decision. This adds to the burden the Petitioner faces and further burdens due process guarantee of the Fourteenth Amendment of the United States Constitution. In this matter there is no effective appeal available in the State of Arizona and thus this second question is added to the instant petition for such action as this Court sees fit and proper.

Notice of Service Pursuant to Rule 29

This document has been served by mail on the attorney of record for the opposing party. In addition, since remotely there may be the constitutionality of a state statute in question, this document was also served on the Attorney General of the State of Arizona pursuant to U. S. C. § 2403(b). Proof of service accompanied this document when it was filed with the United States Supreme Court.

Material Facts of the Case

There is no apparent dispute as to the material facts. This case involves a five year old

child named Chloe, her mother Tammy McGovern, and her maternal grandparents, Montie and Ann McGovern (natural parents of the mother Tammy). Chloe's mother and father were not married at the time of her birth on August 25, 1994. The father's parental rights were terminated, and Tammy McGovern, at the invitation of the grandparents, moved into the guest house at her parent's home in Tubac, Arizona with the then two-week old child. Mother and child remained there until January, 1999.

The grandparents provided significant financial support for the mother and child while they resided together. When the mother returned to work in December, 1995, the grandmother provided child care. The grandparents helped feed, cloth, and house the child. Chloe accompanied the grandparents on occasion on extended summer vacations and attended church and church school with them. During this time, however, the relationship between the mother and her parents was strained, the child was clearly loved and adored by all of them.

The mother moved out of her parents' home in January, 1999, and relocated to Tucson, where she continued to work as the sole support of herself and her child while attending the University of Arizona College of Nursing registered in a full time nursing program. She lives in a home which is centrally located and within walking distance of Chloe's school. Many neighbors and friends form a supportive network for both the mother and child. The child is thriving

in school and is completing first grade in the GATE (Gifted and Talented Education) program this year. She has been involved in extracurricular activities such as tap dancing. Her kindergarten teacher, who has more than fifteen years of experience in the field, reported that Chloe was a happy, well-adjusted child who did not appear to be suffering from depression or anxiety as a result of her family arrangements.

The Superior Court of Pima County, Arizona conducted a two-day trial, as a result of a petition for court-ordered visitation filed March 26, 1999 by the grandparents, on March 1 and March 21, 2000. All of the adult parties testified, as did several other witnesses. The Court took the matter under advisement and ruled on April 10, 2000 that visitation with the grandparents was in the child's best interest. The Court ordered a more limited schedule of visitation than was suggested by the grandparents. However, the order far exceeded what the mother requested. She wanted the issue of visitation with the grandparents to be her decision alone.

No evidence was presented that would suggest the mother was anything other than a fit parent committed to the welfare of her child, Chloe. In fact the evidence presented and the Superior Court concluded that the child was thriving in the home created for her by her mother. Life was difficult for the Petitioner as the mother juggled the need to make a living, a full academic program resulting in her graduation with a BS in nursing in December of 2001, time

and care for her child Chloe, all while attempting to fend off the legal onslaught from her natural parents.

For a period of time after the court ordered visitation in April of 2000 the mother attempted to arrange visitation but the grandparents never agreed on visitation timings that were remotely consistent with the mother's difficult and very full life. The mother filed a motion for reconsideration, first based on Arizona case law suggesting the court ordered visitation was well beyond the constitutional guidelines set by Arizona case law. However, prior to any ruling on this matter this Court released its opinion in *Troxel v. Granville*, 120 S.Ct. 2054 (2000). A motion for declaratory judgment was placed before the Superior Court. In addition the grandparents filed an Order to Show Cause, Re: Contempt alleging the mother did not reach adequate visitation arrangements. Superior Court entered an emergency stay of the visitation order and in late August ruled by minute entry, see the Appendix for the full text of this minute entry. Judge Adam, based on *Troxel*, stated that Superior Court had violated the mother's right for a fit parent to raise her child free from burdensome state interference. The grandparents appealed this order resulting in the opinion under discussion in the instant petition.

The full text of this opinion is contained in the Appendix, however a synopsis is as follows. The Appellate court upheld the Superior Court

when it stated it had violated the parent's due process. Citing violations essentially similar to those mentioned in Troxel; failure to place any weight on a fit mother' opinion, failure to grant a presumption that a fit parent acts in the best interests of the child, shifting the burden of proof to prove that visitation should not happen to the mother, and failure to account for the fact that the grandparents had been offered visitation albeit less than they desired.

The Appeals Court however did not agree with the trial court remedy. The Appeals Court remanded the case for a new trial despite factual findings by the trial court that would make a reversal doubtful at best.

Finally the Appeals Court provided some laudable, but limited guidelines on the conduct of the trial court that, in the mother's opinion, inch towards implementing the requirements of this Court for due process in grandparent visitation case. While concerned that these conditions will prove insufficient to assure due process, that is not the issue of this Petition and is left for some future appeal.

The mother presented a timely petition for review, as required by Arizona Rules of Civil Appellate Procedure, to the Arizona Supreme Court. This petition for review was based on the issue presented herein as well as others. This petition was subsequently denied (see the Appendix) leading to the instant petition. Following this denial, the mother applied for a stay of the mandate from the Court of Appeals, Division

Two, a procedure she believes is provided for and routinely granted under the Rules of Arizona Civil Appellate Procedure. To her surprise this stay was denied (see the Appendix) potentially creating a concurrent trial and the review of the appropriateness of a trial by this Court.

Argument for Question 1

This is not a complex question, nor does it require a long list of case law to support the Petitioner's position. Simply stated, the Petitioner has suffered through extreme difficulty in her life raising her child, working to support the two of them as a nurse's aide, while carrying a full academic course load. She did this not only for her own welfare but for the welfare of her young child. Piled on this fit parent was the additional burden of an extended legal action that is now in its fourth year. She went into debt and still has not been able to retire an approximate $11,000 obligation to her attorney for this process.

Emotional stress was extreme as the grandparents have wished to confiscate her child for all the free time she potentially had to spend with her child. To grant their wishes would have come at the price of her and her child's customary activities. In the meantime she has graduated from college, started a new job and now her future seems to have a degree of hope.

Yet now, the Appeals Court wants to start the process over from scratch because the Superior Court failed to provide due process as guar-

anteed to her under the Fourteenth Amendment. This process indeed has at least the same potential for extending into the future, as the current litigation has extended into her past, generating further appeals, and devastating her life and the life of her child throughout the entire grade school years. At issue is when does the burden of litigation become so unbearable that the desire for litigation, to correct state caused error, become in an of itself a violation of due process?

Mother is a fit parent

In *Troxel v. Granville*, 120 S.Ct. 2054 (2000), Justice O'Connor writes for the plurality, "First, the Troxels did not allege, and no court has found, that Granville was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children." In the instant case, Judge Adam writes in her opinion, "This court was not presented with any evidence that the mother was unfit" , see ¶ 23 in the Appendix. Judge Adam goes on to state in ¶26, "There was not proof that the mother was unfit. She should have been presumed to be a fit parent whose decisions regarding her child were in the child's best interest." Further, the Arizona Appeals Court, Division Two, finds total parallelism between Troxel and the instant case as it stated in ¶12 of its opinion, "The custodial mother in Troxel, **as in our case**, admittedly was a fit parent who had never sought to terminate grandparent visitation entirely." **emphasis**

added Judging by the results, one could conclude that Tammy McGovern, the mother, was doing exceptionally well juggling parenthood with work and school. The Court of Appeals observed in ¶2, "Her kindergarten teacher, who has more than fifteen years of experience in the field, reported that [C.] was a happy, well-adjusted child who did not appear to be suffering from depression or anxiety." Judge Adam observed, "Although the relationship between the mother and her parents was strained, the child was clearly loved and adored by all [grandparents and mother] of them." [added for clarity] (see ¶4 in Appendix).

Not only is there no reason to suspect the mother is not a fit parent, there is every reason to admire and respect her as an exceptional mother, employee, student, and nurse.

Troxel v. Granville

Justice O'Connor in writing for the plurality in *Troxel* in quoting *Prince v. Massachusetts*, 321 U. S. 158 (1944), stated, "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Hindrance by the state can be proactive, such as incarcerating the innocent, or passive as Justice Kennedy stated in his dissent in *Troxel*:

> "If a single parent who is struggling to raise a child is faced with visitation demands from a third party, the attorney's fees alone might destroy her hopes and plans for the child's future. Our system must confront more often the reality that litigation can itself be so disruptive that constitutional protection may be required..."

In forcing unnecessary litigation by remand, more appropriate to a violent criminal than a fit parent, the process itself will hinder the right of a parent to custody and control of her child.

Justice O'Connor in discussing remand in *Troxel* stated:

> "There is thus no reason to remand the case for further proceedings in the Washington Supreme Court. As Justice Kennedy recognizes, the burden of litigating a domestic relations proceeding can itself be "so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated." Post at 9. In this case, the litigation costs incurred by Granville on her trip through the Washington court system and to this Court are without a doubt already substantial. As we have explained, it is apparent that the entry of the visitation order in this case violated the Constitution. We should say so now,

> without forcing the parties into additional litigation that would further burden Granville's parental right."

It is clear that Judge Adam considered and rejected remand as an option as she indicates when describing *Troxel* in ¶15, "The matter [Troxel] was not remanded for further consideration by either the Washington Supreme Court or the trial court." [added for clarity]

The instant case is so parallel in the facts to *Troxel*, the violation of due process so complete, that remand seems unjustified and obviously Judge Adam felt so. The Arizona Court of Appeals, Division Two should have upheld her opinion that stated, "The issue of grandparent visitation is left in the discretion of the mother." (see ¶ 27 in the Appendix). This is a mother who had not totally withheld visitation but merely granted less than the grandparent's desired. Judge Adam recognized this when she stated in ¶7 describing her original order that she vacated, "However, the order far exceeded what the mother requested. She wanted the issue of visitation with the grandparents to be her decision alone." What was unreasonable about that? A mother working as the sole support of the family, going full time to school keeps as precious her limited time with her child. To have her child ripped away by a court order is not a minimal intrusion into her life.

It is timely, in the petitioner's view that the United States Supreme Court made it clear when

litigation itself becomes a burden on due process and rule in this case to prevent the endless litigation imposed by the Arizona Appeals Court, Division Two.

The Arizona Appeals Court Analysis

The Arizona Appeals Court, Division Two, in calling for remand, relied heavily on the Indiana case of *Crafton v. Gibson*, 752 N.E.2d 78 (Ind.App. 07/11/2001). In this case, the question was not developed by the trial court as to whether or not voluntary visitation was offered. (see ¶72 as an example, "Gibson contends that Crafton would not allow any meaningful contact between her and her grandchildren.") Nevertheless, the *Crafton* court noted in ¶114, "We noted that there are different interests at stake in cases where the parties cannot agree to the terms of visitation as opposed to cases were no access has been allowed." And "In the later case, a grandparent would be pursuing the right to have a relationship with the child, while the former case boils down to a mere disagreement between parent and grandparent over how much access is appropriate" (both in quoting a previous Indiana case *Swartz*, Id., 720 N.E.2d at 1222). The *Crafton* court finally concluded that:

> "Although the trial court indicated that it applied a *Troxel* analysis to this case, it appears from the Record and the trial court's reasoning here that no special weight was given to Crafton's decision

> concerning grandparent visitation. Furthermore, the Record is undeveloped with regard to whether the trial court concluded that Crafton had denied Gibson all access to the children or had offered some visitation" as stated in ¶119.

The *Crafton* circumstances are distinguishable from the instant case. The instant case trial court clearly found the mother had offered visits as Judge Adam stated in her section on facts, ¶6, "The grandparents obtained the court-ordered visitation because the mother was not allowing them as much contact with the child as they wished. " (In referring to pre-trial *pende lite* visitation ordered by the superior court.) Later in ¶26 Judge Adam states, "Finally, the fact that the mother had offered limited visitation to the grandparents should have been a factor in this Court's decision" indicating that the mother had offered visitation. Apparently the *Crafton* trial court made no such clear statements as to the parent's intent.

A more appropriate case, referenced by *Crafton*, to rely on for the instant circumstances would have been *Kyle O. v. Donald R.*, 85 Cal.App.4th 848, 102 Cal.Rptr.2d 476 (Cal.App. Dist.3 12/21/2000). In this case the California Appeals Court noted in ¶74,

> "Because the trial court did not make any finding that Kyle was an unfit parent, Kyle is entitled to a presumption that he will act in his child's best interests, and his

> decision regarding the amount of visitation and his preference for a less structured and more normal and spontaneous manner of visitation must be given deference."

Going on in ¶75 in factual circumstances very similar to the instant case the *Kyle O.* Court concluded:

> "Kyle agreed that visitation was appropriate, agreed that Rachel needed a relationship with the grandparents, and agreed to allow visitation with them; he only contested their right to specify the amount and timing of the visitation. Kyle simply wanted Rachel to have a more flexible and spontaneous relationship with her maternal grandparents, such as she had with her paternal grandparents."

The final conclusion by the *Kyle O.* Court was expressed in ¶79, "Because the visitation order violated Kyle's parental rights guaranteed by the Due Process Clause of the Fourteenth Amendment, the order must be reversed, and remand for further proceedings on the question of **visitation is inappropriate" emphasis added**. It appears that the Arizona Court in a similar factual situation became confused concerning some voluntary visitation, prior to the *pende lite* award, that did not occur due to an extended childhood infection. This confusion in and of itself makes the case for parental control over

visitation because circumstances with children change. In fact a rigid court ordered visitation schedule was at the root of the many of the problems dealt with by the *Kyle O.* court when it stated in ¶77:

> "The only evidence they [grandparents] offered to support their belief that court-ordered visits were necessary was Kyle's hostility toward the grandparents. But his hostility was caused in part by their pursuit of court-ordered visits and their refusal to deviate from the schedule without receiving an exact quid pro quo even if their refusal was not in Rachel's best interest. The grandparents' argument was circular and insufficient to overcome the presumption in favor of Kyle's fundamental right to make parenting decisions regarding his child's visits with a non-parent."

Like Kyle O., the fit mother, Tammy McGovern, in the instant case, merely wants her own judgment as to what is in the best interest of her child at the moment, not as determined by a court months or years prior. The Arizona Court of Appeals Court's reliance on the *Crafton* reasoning seems out of place in the instant case since the basic facts are not the same and remand for more fact finding seems to serve only the expan-

sion of the interference with the parental right of custody and control.

Further, remand appears in contrast to the Kansas Supreme Court conclusion in similar circumstances as it stated, "However, since we have determined that the Paillets [grandparents] did not meet their burden of proof as to both requirements of the statute, it would serve no purpose to remand the matter to the district court." (see *Kansas v. Paillet*, 2001.KS.0000035 No. 82,950 (Kan. 02/02/2001) ¶82)[added for clarity]. The justification for remand is more an expensive and extensive fishing expedition than one of any real expectation of the discovery of new factual basis for visitation. The facts of the case have been thoroughly examined by the trial court and it is only in examining those facts in light of the *Troxel* ruling that resulted in the ruling of the court. There has been no failure to find necessary facts as was the case in *Crafton*. To return to trial is to violate *res judicata* and to subject the parent to endless need to defend herself. If the grandparents feel a change of circumstances, sufficient to result in an altered ruling, has occurred since the last fact finding trial, they may enter a new order to show cause.

Argument for Question 2

The Arizona Rules for Civil Appeal rule 24(b) states:

"(b) Stay of Mandate Pending Application for Certiorari.

> (1) A stay of the issuance of the mandate of either the Court of Appeals or the Arizona Supreme Court pending application to the United States Supreme Court for a writ of certiorari may be granted upon request."

While this rule is not automatic and the operative word is "may", it is the Petitioner's belief that this rule is customarily honored by the Appeals Court. To not do so would create the legal crisis likely to be created in the instant case. The Petitioner filed a timely request for the stay stating her expectation to timely file this petition. As contained in the Appendix, the Appeals Court of Arizona, Division Two denied this request without comment as to why it was not granted. The Petitioner thus forms no opinion as to whether the motivation contained a prejudicial component or was for other reasons.

However, no matter the motivation, the only practical effect of this denial is that it tends to make the filing of a Petition for Writ of Certiorari with the United States Supreme Court less viable. The Petitioner believes that even single parents raising children are afforded access to the United States Supreme Court to the degree reflected by this Court's rules. Thus the effect of this order is further denial of due process under the Fourteenth Amendment to the US Constitution. As well it creates many practical issues for the trial court since it is prohibited in Arizona law, mandate or not, from taking any action that

is not in furtherance of the appeal. Clearly a new trial with presumably a new order cannot be in furtherance of the appeal when the issue at appeal is whether that trial is lawful or not. When the mandate is issued the trial, that is central to this petition may well start pre-trial activity (as the writing of this petition Judge Adam had scheduled a trial for May 28th, 2002 and the Petitioner filed a motion for continumance until this petition is resolved) concurrently with review by this court. As a practical matter there is no review available of this order in Arizona. Before the Arizona Supreme Court could review this order the issue would become moot. Actions by the United States Supreme Court could be the ordering of a stay of further trial activity until this petition is resolved or it could take this as a further indication of the violation of due process by the Arizona Court system.

Conclusion

The Arizona Appeals Court, Division Two in a case factually very similar to *Troxel*, upheid a Superior Court Judge's opinion that she had violated due process albeit in a *pre-Troxel* ruling. The Petitioner, the fit parent in the instant case, while gratified with that result was dismayed to learn that four years of litigation was not to be enough. The court said the grandparents, her natural parents, get a second chance, overturning what she felt was the well considered opinion of the trial judge.

Her whole college career, hard enough, was indeed clouded with litigation or the threat of litigation. It has left her in substantial debt and emotionally scarred as only those attacked by their own parents can be! And now who knows how much more. Win or lose in trial likely another appeal and another costly trip through the Arizona Court System. Four or five more years puts her child near her teenage years. While other grade school parents worry about the school play, PTA bake sale, and keeping their children away from drugs and other harms of our modern society, she worries about tomorrow's court appearance or next week's petition deadline.

Some may say "just give up!" and indeed apparently that is her natural parent's legal strategy. Make the parent do things to the child that in good conscience she cannot. Force visitation simply in the first place because a judge thinks he or she knows better how to raise her child than does the committed and caring 24/7 mother. Now to force visitation simply because the cost of opposition becomes too oppressive. Neither approach satisfies the due process requirement of the Fourteenth Amendment, at least not in the Petitioner's eyes. It is time, in her view, that the United States Supreme Court, sets the rules for litigation in the cases of those whose crime is only being a fit parent. _

RESPECTIVELY SUBMITTED this 22 day of April, 2002.

ROBERTS, ROWLEY & CHAPMAN LTD

Paul S Rowley
63 E Main Street, Suite 501
Mesa, Arizona 85201-7423
480/833-1113 (Phone)
480/833-1114 (Facsimile)

Appendix

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III. Denial of Review, Arizona Supeme Court, page 59

IV. Denial of Stay of Mandate for Petition for Writ of Certiorari, page 61

Superior Court Minute Entry of Judge Adam

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE PRO TEMPORE: HON. KAREN ADAM

COURT REPORTER: NONE

CASE NO. **D125189**

DATE: August 28,2000

MONTIE McGOVERN and ANN McGOVERN,
MATERNAL GRANDPARENTS
Petitioners

and

TAMMY McGOVERN
Respondent

MINUTE ENTRY

IN CHAMBERS MINUTE ENTRY RE RESPONDENTS MOTION FOR DECLARATORY JUDGMENT, NOTICE OF SUPPLEMENTAL AUTHORITY, REQUEST FOR EMERGENCY STAY OF VISITATION, AND REQUEST FOR ATTORNEY'S FEES/PETITIONERS' PETITION FOR CONTEMPT AND CLARIFICATION OF ORDER AND ORDER TO SHOW CAUSE AND REQUEST FOR ATTORNEY'S FEES/ PETITIONERS' MOTION TO DISMISS

¶1 The Court has received and reviewed the petitioners' response and the respondent's reply. The Court also received second and third supplemental authorities from the respondent. Those supplements were not used as they were filed after the deadline for the reply and permission was not sought for their consideration. The Court had previously received and reviewed respondent's motion for reconsideration, motion for declaratory judgment, supplemental authority, and request for attorney's fees, and petitioners' petition for contemt and clarification of order.

¶2 The issue before the Court is whether the current order for grandparent visitation in this matter is constitutional in light of the recently decided United States Supreme Court case of *Troxel v. Granville,* 120 S.Ct. 2054(2000),_____U.S._____(2000).

I. Facts

¶3 This case involves a five year old child named Chloe, her mother Tammy McGovern, and her maternal grandparents, Monte and Ann McGovern. Chloe's nother and father were not married at the time of her birth on August 25, 1994. The father's parental rights were terminated, and Tammy McGovern moved into the guest house at her parent's home in Tubac with the then two-week old child. Mother and child remained there until January, 1999.

¶4 The grandparents provided significant support for the mother and child while they resided

together. When the mother returned to work in December, 1995, the grandmoher provided child care. The grandparents fed, clothed, and housed the child. She accompanied them on extended summer vacations and attended church and church school with them. Although the relationship between the mother and her parents was strained, the child was clearly loved and adored by all of them.

¶5 The mother moved out of her parents' home in January, 1999, and relocated to Tucason, where she continued to work and to attend the University of Arizona College of Nursing. She lives in a home which is centrally located and within walking distance of Chloe's school. Many neighbors and friends form a supportive network for both the mother and child. The child is thriving in school and will start first grade in the GATE (Gifted and Talented Education) program. She has been involved in extracurricular activities such as tap dancing. Her kndergarten teacher, wh has more than fifteen years of experience in the field, reported that Chloe was a happy, well-adjusted child who did not appear to be suffering from depression or anxiety.

¶6 At the time the Court entered the order at issue in this case, the child was visiting with her grandparents once a week for six hours, on either Saturday or Sunday, pursuant to a temporary order entered on May 7, 1999. The grandparents obtained the court-ordered visitation because the mother was not allowing them as much contact with the child as they wished.

In preparation for the hearing in the case, the grandparents retained Jan Harrell, Ph.D, to conduct a grandparent-visitation evaluation. In July and August 1999, Dr. Harrell conducted interviews of all the parties, observed the child with each, and evaluated the results of the Minnesota Multiphase Personality Inventory II (M.M.P.I.) testing on the adults. She also reviewed written materials and comments from the parties and collateral sources. Dr. Harrell found that the child was very attached to her grandparents and recommended she have regular and significant contact with them.

¶7 This Court conducted a two-day trial in the matter on March 1 and March 21, 2000. All of the adult parties testified, as did Dr. Harrell and several other witnesses. Dr. Harrell's report and other exhibits were introduced. The Court took the matter under advisement and ruled on April 10, 2000, that visitation with the grandparents was in the child's best interest. The Court ordered a more limited schedule of visitation than was suggested by Dr. Harrell and the grandparents. However, order far exceeded what the mother requested. She wanted the issue of visitation withthe grandparents to be her decision alone.

II. Arizona law

¶8 In reaching its decision, this Court relied on the Arizona statutes and case law governing grandparent visitation. The Court spedifically found that the grandparent visitation statute

A. R. S. § 25-409, governed in this case, rather than the third-party custody or *in loco parentis* statute, A. R. S. § 25-415. The grandparent visitation statute was enacted in 1984. Prior to that time, there was no statutory authority for grandparent visitation. The statute was amended in 1988, 1992, and 1997, and now provides reasonable visitation may be granted tothe grandparents of a child during his/her minority on finding that (1) the parents of the child are divorced, were never married or one is deceased or missing for at least three months, and that, (2) such visitation would be in the child's best interest. The statute contains a list of factors that the Court must consider in determining the best interests of the child. Those factors are:

1. The historical relationship, if any, between the child and the person seeking visitation;

2. The motivation of the party seeking visitation;

3. The motivation of the person opposing visitation;

4. The quantity of visitation time requested and the potential adverse impact that visitation will have on the child's customary activities; and

5. If one or both child's parents are dead, the benefit in maintaing an extended family relationship. A. R. S. § 25-409 (C)(1-5). In addition there is a requirement that, if logistically possible

and appropriate, any visitation ordered should occur at the time the child is spending time with or residing with the parent through whom the grandparents claim access. A. R. S. § 25-409(D).

¶9 There is limited Arizona case law interpreting the grandparent visitation statute. *Graville v. Dodge*, 195 Ariz. 119, 985 P.2d 604, (App 1999) is the seminal case. There the maternal grandparents sought visitation with their granddaughters after the girls' mother, their daughter, died. The mother and children had resided with the maternal grandparents for extended-periods of time over the course of several years. After the mother died, the father decided to stop contact between the grandparents and the girls. The-grandparents filed a request for court-ordered visitation pursuant to the grandparent visitation statute.

¶10 Prior to the trial, the Court appointed a psychologist to determine whether visitation with the grandparents was in the best interests of the children. She concluded that it was. After the trial, the Court ordered limited visitation and the father appealed, arguing that the statute was unconstitutional and the amount of visitation ordered was unreasonable.

¶11 The Court of Appeals, Division One, upheld the statute and the specific visitation order. Applying the rational basis standard of review, the Court found that the law was reasonably related to a legitimate state interest "...in promoting healthy family relationships that enable children to become well-adjusted, responsible

adults. The statute in question promotes these goals by providing for visitation with grandparents when it is shown to be in the best interests of the child." *Id.* at 125 Altough the Court recognized the well-established principle that parents have a fundamental right under the Fourteenth Amendment to raise their children without state interference, the statute was found to be a minimal burden on that right.

¶12 The father in *Graville* also urged that a showing of harm to the children must be shown before the state may interfere with the fundamental right to parent. He cited *Cochise County Juv. Action No. 5666-J*, 133 Ariz. 157, 650 P.2d 459(1982) in support of that position. In that case, as in other dependency cases, a showing of harm to the children is required before state action can be taken to interfere with parental rights. The *Graville* Court distinguished the grandparent visitation issue from issues raised in dependency case where the state seeks full legal custody and control of children. The Court found that no harm to the children need be shown before grandparent visitation is ordered. See *Graville*, 119 Ariz. at 127.

¶13 In addition to finding the statute constituional on its face, the Court also ruled that visitation order was reasonable and was only a minimal intrusion into the father's right to parent his children. The Court found that an award of eight hours a month plus five days annually during vacation periods was not excessive because the children had spent considerable

amount of time living with the grandparents. The dates and times were flexible and did not impinge on the children's regularly scheduled activities. Other more restrictive directives from the superior court were stricken as being too intrusive on the father's constitutional right to parent. Those included requiring the father to encourage weekly phone calls, to consider the grandparents first for babysitting, and to refain from discussing custody issues with the children.

¶14 The father in *Graville* further argued that the proper standard of proof for establishing what is in the best interest of children is clear and convincing evidence. The statute does not set forth a burden of proof. The Court noted that, on appeal, a trial court's findings will be sustained if the record contains substantial evidence to support them and if there is no abuse of discretion. The Court did find substantial evidence of best interest in this case and that the trial court did not abuse discretion. The Court of Appeals found the grandparent statute constitutional and upheld the visitation order.

III. *Troxel v Granville*

¶15 In *Troxel v. Granville*, 120 S.Ct. 2054 (2000);_____U.S._____(2000), the United States Supreme Court considered an award of grandparent visitation made pursuant to a Washington statute that allowed any person to petition the superior court for visitation rights at any time, and that authorized the court to grant that

visitation if it was in the best interests of the child. The Court found the application of that statute unconstitutional in the case at bar and declare the Washington statute unconstitutional on its face. The matter was not remanded for further consideration by either the Washington Supreme Court or the trial court.

¶16 The paternal grandparents in Troxel sought visitation with their grandchildren after their son, the children's father, committed suicide. He and the children's mother were never married. The mother offered visitation but it was not as much as the grandparents wanted, and they petitioned the superior court for an order. After the hearing, the trial judge ordered visitation one weekend per month, one week during the summer and four hours on each of the paternal grandparents' birthdays. The mother appealed.

¶17 The Washington Court of Appeals vacated the visitation order and dismissed the paternal grandparents' petition, based on a lack of standing. The Washington Supreme Court upheld the dismissal, though, on other grounds, and found the entire visitation statute unconstitutional. The Court ruled that the statute unconstitutionally infringed on the fundamental rights of parents to raise their children and did not require a showing of harm before state interference with that right. Further the Court the Court found that the statute was too broad in that it allowed anyone, at any time, to request visitation, and only a best interest finding was required for such an order.

¶18 In a plurality opinion, written by Justice O'Connor, the United States Supreme Court ruled that the application of the Washington statute in this case violated the mother's fundamental right to parent as guaranteed by the Due Process Clause of the Fourteenth Amendment. The Court noted that "the liberty interest at issue in this case-the interest of parents in the care, custody, and control of their children--is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.* at 2060. The fundamental right of parents to raise children their children without state interference has been continuously upheld, from *Meyer v. Nebraska*, 262 U.S. 390 (1923) through *Parham v. J.R.*, 442 U.S. 584 (1979).

¶19 The United States Supreme Court was concerned with both the breadth of the Washington statute and that it lacked a requirement that a parent's decision regarding visitation be accorded any weight. Under Washington law, a court could completely disregard the decision of a fit parent if the judge found that visitation is in the child's best interest.

> "[the] Washington statute places the best-interest determination soley in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view nedessarily prevails. Thus in practical effect in the State of Washington a court can disregard and overturn *any* decision by a fit custodial parent

> concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interest." *Id. at 2062* (emphasis in original)

The *Troxel* Court noted that the trial judge had found no special factors that would justify state interference with the mother's decision regarding visitation, and absent those factors, the trial judge's application of the statute in this case violated the mother's due process rights.

¶20 Specifically, the *Troxel* Court noted three problems with the visitation order. First, there was no allegation that mother was not a fit parent. There is a presumption that fit parents act in the best interest of their children. *See Parham, 442 U.S. at 602.* Absent a showing that a parent is not properly caring for his or her children, there should be no reason for the state to "inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of the parent's children." *Troxel,* 120 at 2061.

¶21 The second problem was that the trial judge gave no deference to the mother's determination of what was in her children's best interests. The trial judge should have presumed her to be a fit parent making decisions in the best interest of her children. *Id.* at 2062. Instead, the trial judge appeared to presume that the visitation would be granted unless it was shown that the children would be negatively impacted. That

presumption resulted in a shift in the burden of proof to the mother, which further infringed on her fundamental right to make decisions in the best interest of her children. *Id.*

¶22 Finally, the trial court gave no weight to the mother's repeated offer of visitation to the grandparents. Instead he substituted his opinion as to what visitation would be in the best interest of the children. When combined with the other two problems noted above, the Court found that "visitation order in the case was an unconstitutional infringement on (the mother's) fundamental right to make decisions concerning the care, custody, and control of her two daughters." *Id*, at 2063.

IV. Application of *Troxel v. Granville* to McGovern v. McGovern

¶23 The Arizona grandparent visitation statute is not written as broadly as the Washington statute at issue in *Troxel.* Nonetheless, as applied in the instant case, the Court finds the *Troxel* analysis appropriate. First, the Arizona statute, as interpreted by *Graville v. Dodge, supra*, does not require proof that the parent opposing visitation is unfit and therefore not making decisions in the best interest of the children. This court was not presented with any evidence that the mother was unfit and did not require such evidence before proceeding. Second, the statute does not attribute any special weight to the decision of a presumably fit parent. The only stat-

utory reference to the parent's wishes is the requirement that the court consider the parent's motivation in opposing visitation as one of several factors in determining whether visitation is in the best interest of the child. In its original visitation order, this Court considered the mother's motivation for wanting to limit visitation along with all of the other factors set forth in the statute. This Court afforded the mother's decision no special weight.

¶24 Third, the same trial procedures were used in the instant case as were used by the trial judge in *Troxel*. In the trial of this case, the grandparents presented evidence in support of their position that visitation was in the best interest of the child. The mother was then required to rebut the grandparent's evidence and present evidence in support of her own decision. The burden of proof was thus shifted to the mother to show why visitation was not in the best interest of the child.

¶25 Finally, A. R. S. § 25-409 does not make a distinction between parents who refuse all visitation and those who do not. Visitation may be awarded according to a trial court's determination of best interest and reasonableness, regardless of whether a parent has agreed to some contact with the grandparents. In its original order, this Court similarly did not credit the mother with offering visitation to the grandparents, though less than they wanted.

VI. Conclusion

¶26 The Court finds that its application of the

grandparent visitation statute in this case violated the mother's fundamental right to parent her child without state interference as guaranteed by the Due Proces Clause of the Fourteenth Amendment. See *Troxel*, 120 S.Ct. 2054 (2000). There was not proof that the mother was unfit. She should have been presumed to be a fit parent whose decisions regarding her child were in the child's best interest. Once the matter proceeded to trial, the burden of proof should have been on the grandparents to show that the mother's decision wan not in the child's best interest. The mother's decision regarding visitation should have been given special weight. Finally, the fact that the mother had offered limited visitation to the grandparents should have been a factor in this Court's decision. For the reasons set forth,

¶27 **IT IS THEREFORE ORDERED** granting the motion for reconsideration and vacating the order visitation entered on April 10, 2000. The issue of grandparent visitation is left in the discretion of the mother.

IT IS FURTHER ORDERED denying the request for declaratory judgment.

IT IS FURTHER ORDERED denying the request for attorney's fees.

IT IS FURTHER ORDERED denying the petition for contempt and for clarification of the order.

Karen S. Adam

Hon. Karen Adam

cc: Hon. Karen Adam
Domestic Calendaring
Cheryl K. Copperstone, Esq.
William W. Wissler, Esq.
Paul S. Rowley, Esq, _Roberts & Rowley, Ltd., 63 East Main Street, Suite 501
Mesa, AZ 85201-7423

Note: The paragraph numbers have been added to add clarity and enable referencing.

Appeals Court Opinion

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO
MONTIE McGOVERN and ANN McGOVERN,
Petitioners/Appellants,
v.
TAMMY McGOVERN,
Respondent/Appellee.

2 CA-CV 01-0016
DEPARTMENT A
O P I N I O N
APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY
Cause No. D-125189
Honorable Karen S. Adam, Judge Pro Tempore
AFFIRMED IN PART;
VACATED IN PART AND REMANDED
Cheryl K. Copperstone
Roberts & Rowley, Ltd.
By Paul S. Rowley
Tucson
Attorney for Petitioners/Appellants
Mesa
Attorneys for Respondent/Appellee
P E L A N D E R, Judge.

¶1 Petitioners/appellants Montie and Ann McGovern filed an action under Arizona's grandparents' visitation statute, A.R. S. § 25-409,

to obtain court-ordered visitation with their granddaughter, C. Their daughter, respondent/ appellee Tammy McGovern, opposed the petition.

After a two-day trial, the trial court granted the grandparents' petition in April 2000. In August, however, the court granted the mother's motion for reconsideration and vacated its earlier order in light of Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), decided after the court's initial ruling. The trial court did not conduct any further proceedings, but rather, left visitation to the sole discretion of the mother. This appeal by the grandparents followed. We affirm in part, vacate in part, and remand the case for further proceedings.

BACKGROUND AND PROCEDURAL HISTORY

¶2 The trial court's August 2000 ruling succinctly summarizes the undisputed factual background: This case involves a five-year old child [C.], her mother Tammy McGovern, and her maternal grandparents, Mont[i]e and Ann McGovern. [C.]'s mother and father were not married at the time of her birth on August 25, 1994. The father's parental rights were terminated, and Tammy McGovern moved into the guest house at her parent[s'] home in Tubac with the then two-week-old child. Mother and child remained there until January, 1999. The grandparents provided significant financial support for the mother and child while they resided together. When the

mother returned to work in December, 1995, the grandmother provided child care. The grandparents fed, clothed and housed the child. She accompanied them on extended summer vacations and attended church and church school with them. Although the relationship between the mother and her parents was strained, the child was clearly loved and adored by all of them. The mother moved out of her parents' home in January, 1999, and relocated to Tucson, where she continued to work and to attend [college]. She lives in a home which is centrally located and within walking distance of [C.]'s school. Many neighbors and friends form a supportive network for both the mother and child. The child is thriving in school . . . [and] has been involved in extracurricular activities . . . . Her kindergarten teacher, who has more than fifteen years of experience in the field, reported that [C.] was a happy, well-adjusted child who did not appear to be suffering from depression or anxiety. At the time the Court entered the order [granting visitation] in this case, the child was visiting with her grandparents once a week for six hours, on either Saturday or Sunday, pursuant to a temporary court order entered on May 7, 1999.

¶3 It is undisputed that, over the four and one-half years the mother and C. lived with the grandparents, a significant and loving bond developed between the grandparents and C. The grandparents' contact with C. was daily and constant. When the mother and C. relocated

to Tucson, the grandparents felt a great personal loss and were also concerned about the effect this disruption of contact would have on their granddaughter. They immediately sought to establish regular visitation with C., and the mother assured them she would allow that. The record, however, reflects that, except for two or three weekend visits in early 1999, no visitation occurred for several months until the stipulated pendente lite visitation order in May, issued as a result of the grandparents' petition for court-ordered visitation. The record also reflects that the mother did not offer any additional visitation to the grandparents, other than some make-up time, from the time the temporary order was issued in May 1999 until the trial in March 2000.

¶4 The parties, witnesses for both sides, and a court-appointed psychologist testified at trial. In April 2000, the trial court ruled in pertinent part:

> THE COURT FINDS that visitation with the grandparents is clearly in the best interest of the child. There is a long, caring relationship between them. The grandparents' motivation for visitation is primarily because of their love of the child and their wish to remain in her life. The mother's motivation in denying the requested visitation is primarily because of her desire to act as an independent parent without undue influence or involvement from others. THE COURT DOES FIND, however, that the

> quantity of visitation time requested is excessive, may have an adverse impact on the child's customary activities, and is greater than the minimal intrusion contemplated by *Graville* [*v. Dodge*, 195 Ariz. 119, 985
> P.2d 604 (App. 1999)].

IT IS THEREFORE ORDERED that the following visitation shall be awarded to the maternal grandparents, beginning April 15, 2000:

1. One weekend per month, from Friday after school through Sunday, until one hour before bedtime.
2. The first four days and overnights of Christmas vacation with return to the mother, at the latest, by December 23 at 5:00 p.m.
3. The first two days and overnights of Spring break.
4. Two weeks of summer vacation. If there is some overlap with regularly scheduled visitation, there shall be no makeup visitation without the mother's agreement.

¶5 The mother later moved for reconsideration and for a declaratory judgment based on Troxel. In a thorough, well-reasoned order, the trial court granted the motion for reconsideration and vacated its April order, ruling as follows:

The Court finds that its application of the grandparent visitation statute in this case violated the mother's fundamental right to parent her child

without state interference as guaranteed by the Due Process Clause of the Fourteenth Amendment. See *Troxel*, 120 S.Ct. 2054 (2000). There was no proof that the mother was unfit. She should have been presumed to be a fit parent whose decisions regarding her child were in the child's best interest. Once the matter proceeded to trial, the burden of proof should have been on the grandparents to show that the mother's decision was not in the child's best interest. The mother's decision regarding visitation should have been given special weight. Finally, the fact that the mother had offered limited visitation to the grandparents should have been a factor in this Court's decision. For the reasons set forth, IT IS THEREFORE ORDERED granting the motion for reconsideration and vacating the order for visitation entered on April 10, 2000. The issue of grandparent visitation is left in the discretion of the mother.

DISCUSSION

¶6 We review for an abuse of discretion a trial court's decision to grant or deny visitation. Armer v. Armer, 105 Ar iz. 284, 289, 463 P.2d 818, 823 (1970); Graville v. Dodge, 195 Ariz. 119, ¶37, 985 P.2d 604, ¶37 (App. 1999) (Dodge I). That same standard of review applies to a trial court's ruling on a motion for reconsideration. Cf. Kirby v. Rosell, 133 Ariz. 42, 46, 648 P.2d 1048, 1052 (App. 1982) (grant or denial of motion for new trial within sound discretion of trial court that will not be upset absent clear abuse of discretion); Modla v. Parker, 17 Ariz. App. 54, 56,

495 P.2d 494, 496 (1972) (order setting aside final judgment will not be disturbed absent clear abuse of trial court's discretion). This appeal, however, raises issues of statutory interpretation and constitutional law, which we review de novo. Ramirez v. Health Partners of Southern Arizona, 193 Ar iz. 325, ¶6, 972 P.2d 658, ¶ 6 (App. 1998).

¶7 The grandparents challenge the trial court's ultimate ruling, contending the court's original order granting visitation pursuant to § 25-409 did not offend any constitutional due process constraints set forth in *Troxel.* The mother counters that Troxel compelled reversal of the first order because, in granting court-ordered visitation against her wishes, the trial court had failed to apply certain constitutionally mandated safeguards later established in *Troxel.* The first issue, therefore, is whether the statute, as applied in the trial court's original order, contravened *Troxel* by "violat[ing] the mother's fundamental [constitutional] right to parent her child without state interference," as the court ultimately ruled. And, if so, does that conclusion mandate the trial court's futher ruling that "[t]he issue of grandparent visitation is left in the discretion of the mother"? Our uncertainty about the specific meaning of that latter ruling and the lack of any

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[1]C. admittedly "was born out of wedlock," one of the three enumerated conditions under subsection (A). A. R.S. § 25-409(A)(3).

majority opinion in *Troxel* complicates the resolution of these issues.

¶8 Section 25-409 provides in pertinent part:
A. The superior court may grant the grandparents of the child reasonable visitation rights to the child during his minority on a finding that the visitation rights would be in the best interests of the child and any of the following [three conditions][1] are true:
. . . .
C. In determining the child's best interests the court shall
consider all relevant factors, including:
1. The historical relationship, if any, between the child and the person seeking visitation.
2. The motivation of the requesting party in seeking visitation.
3. The motivation of the person denying visitation.
4. The quantity of visitation time requested and the potential adverse impact that visitation will have on the child's customary activities.
5. If one or both of the child's parents are dead, the benefit in maintaining an extended family relationship.
¶9 "[P]arents have a constitutionally protected right under the Fourteenth Amendment
to raise their children as they see fit." *Dodge I*, 195 Ar iz. 119, ¶19, 985 P.2d 604, ¶ 19; see also *Troxel*, 530 U.S. at 65-66, 120 S. Ct. at 2059-60, 147 L. Ed. 2d at 56. As the court in Dodge concluded, however, grandparent visitation pursu-

ant to § 25-409 "does not substantially infringe on parents' fundamental rights." 195 Ariz. 119, ¶23, 985 P.2d 604, ¶ 23.[2] In rejecting a parent's constitutional challenge to § 25-409, the court further concluded that the statute "is rationally related to furthering the state's legitimate interest in enabling children to become responsible adults by fostering relationships between grandchildren and their grandparents." Id. at ¶ 27.
¶10 The facial constitutionality of § 25-409 is not at issue here. Rather, we must address the

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[2]In *Graville v. Dodge*, 197 Ariz. 591, ¶ ¶14, 21-22, 5 P.3d 925, ¶¶14, 21-22 (App. 2000) (Dodge II), Division One held that "the legislature intended to allow the trial court to order supervised visitation under section 25-410(B) in grandparent visitation cases" and rejected the father's constitutional challenge to the trial court's order appointing a psychologist to supervise the grandparents' visitation. The United States Supreme Court, however, vacated that decision and remanded the case for reconsideration in light of Troxel. Dodge v. Graville, ___ U.S. ___, 121 S. Ct. 2584, 150 L. Ed. 2d 745 (2001) (mem.).

[3]Apparently, Justice Souter also agreed that the Washington statute was overbroad. 530 U.S. at 79, 120 S. Ct. at 2067, 147 L. Ed. 2d at 65 (Souter, J. , concurring in the judgment).

trial court's rulings in light of Troxel to determine whether § 25-409 was, or may be, constitutionally applied in this case.

¶11 Both *Dodge I* and the trial court's initial ruling in this case predated Troxel, in which the United States Supreme Court concluded that Washington's nonparental visitation statute was unconstitutional as applied. 530 U.S. at 73, 120 S. Ct. at 2064, 147 L. Ed. 2d at 61. Because the Supreme Court disposed of Troxel with multiple opinions, none of which garnered a majority of the justices, it is difficult to extract and

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[4]Justices Stevens and Kennedy also recognized that presumption. 530 U.S. at 87, 120 S. Ct. at 2071, 147 L. Ed. 2d at 69 (Stevens, J. , dissenting); id. at 97-98, 120 S. Ct. at 2077, 147 L. Ed. 2d at 76 (Kennedy, J. , dissenting); see also Eric B. Martin, Note, by the Supreme Court: Suggestions for a Constitutional Nonparental Visitation Statute After Troxel v. Granville, 76 Wash. L. Rev. 571, 588-89 (2001); Susan Tomaine, Comment, Troxel v. Granville: Protecting Fundamental Parental Rights While Recognizing Changes in the American Family, 50 Cath. U. L. Rev. 731, 773-74 (2001). And, Justice Souter expressed concern with the lack of any presumption or weight to be given to the parent's visitation decision under Washington's statutory scheme. 530 U.S. at 78 n. 2, 120 S. Ct. at 2066 n.2, 147 L. Ed. 2d at 64 n.2 (Souter, J. , concurring in the judgment).

apply clear constitutional principles from the case. In the plurality opinion authored by Justice O'Connor, however, four justices characterized the Washington statute as "breathtakingly broad,"[3] id. at 67, 120 S. Ct. at 2061, 147 L. Ed. 2d at 57; recognized a "presumption that fit parents act in the best interests of their children, "[4] id. at 68, 120 S. Ct. at 2061, 147 L. Ed. 2d at 58; and concluded that a trial court "must accord at least some special weight to the parents' own determination" with respect to nonparental visitation. Id. at 70, 120 S. Ct. at 2062, 147 L. Ed. 2d at 59.

¶12 The custodial mother in *Troxel,* as in our case, admittedly was a fit parent who had never sought to terminate grandparent visitation entirely.[5] Id. at 68, 71, 120 S. Ct. at 2061, 2062-63, 147 L. Ed. 2d at 58, 60. According to the plurality decision, the Washington trial court not only had failed to recognize a presumption that favored the mother's determination, but also had applied an opposite presumption by placing on her, "the fit custodial parent, the burden of disproving that visitation would be in

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[5]The trial court in our case apparently found that the mother had not completely denied visitation to the grandparents at any time pertinent to its ruling. The record, however, reflects that visitation neither occurred nor was offered for approximately four months between late January 1999 and the May *pendente lite* order.

the best interest of her daughters." Id. at 69, 120 S. Ct. at 2062, 147 L. Ed. 2d at 59. In addition, the plurality opinion noted that the Washington trial court had "failed to accord the determination of [the mother] . . . any material weight," id. at 72, 120 S. Ct. at 2063, 147 L. Ed. 2d at 60, and had given "no weight to [her] having assented to visitation even before the filing of any visitation petition or subsequent court inter vention." Id. at 71, 120 S. Ct. at 2063, 147 L. Ed. 2d at 60. Based on all of those factors, the plurality concluded that the Washington statute, as applied to the mother and her family, violated her fundamental due process right to make decisions about the care, custody, and contr ol of her children. Id. at 75, 120 S. Ct. at 2065, 147 L. Ed. 2d at 62.

¶13 After *Troxel* and after the trial court's ultimate ruling in this case, Division One once again was called upon to address the constitutionality of § 25-409. *Jackson v. Tangreen*, 199 Ariz. 306, 18 P.3d 100 (App. 2000). The court reaffirmed its holding in *Dodge I* that § 25-409 "is constitutional on its face," id. at ¶ 31, and concluded that the statute " satisfies the due process concerns articulated in *Troxel*." Id. at ¶12. The court stated, "by applying the statute as written, Arizona courts do not violate the Due Process Clause." Id. at ¶14. The court also remarked that § 25-409 "applies only in cases in which a parent has denied visitation, not merely limited it." Id.

¶14 We agree with *Jackson* that *Troxel* does not

require us to invalidate § 25-409. See, e.g. , *Lopez v. Martinez*, 102 Cal. Rptr . 2d 71, 77-78 (Ct. App. 2000); *Crafton v. Gibson*, 752 N.E.2d 78, 92 (Ind. App. 2001); *Zeman v. Stanford*, 789 So. 2d 798, 803 (Miss. 2001); Fitzpatrick v. Youngs, 717 N.Y. S.2d 503, 506 (N.Y. Fam. Ct. 2000). But because the constitutionality of the statute as applied is at issue here and because we question some of the broad statements in *Jackson*, we attempt to offer further guidance about *Troxel's* impact on the interpretation and application of § 25-409.

¶15 We first note that the statute has several self-limiting features. For example, the statute is framed in permissive rather than mandatory terms, allowing but not requiring the superior court to grant "reasonable visitation rights" to grandparents. § 25-409(A). In addition, such rights may arise only if the trial court finds that grandparent visitation "would be in the best interests of the child" and that one of the three enumerated conditions in subsection (A) exists. And, in determining the child's best interests, the court is required to consider " all relevant factors," § 25-409(C), including, but not limited to, those set forth in subsection (C). See *Jackson*, 199 Ar iz. 306, ¶11, 18 P.3d 100, ¶ 11.

¶16 *Dodge I* and *Jackson* also recognize other significant principles that should affect a trial court's decision under § 25-409 on whether to order grandparent visitation and, if so, how-much. As noted in *Dodge I*, the statute " is structured to enable the [trial] court to make

grandparent visitation a minimal burden on the rights of the child's parents." 195 Ariz. 119, ¶23, 985 P.2d 604, ¶ 23. In other words, "if the court decides to grant visitation, the order must be as minimally intrusive as possible." Id. at ¶ 33. The court in *Dodge I* also noted the legislature's awareness of "'parents' superior right to the custody and care of their children.'" Id., quoting *West v. West*, 689 N.E.2d 1215, 1221 (Ill. App. 1998). See also *Jackson*, 199 Ar iz. 306, ¶14, 18 P.3d 100, ¶ 14.

¶17 Meshing those established concepts with our reading of *Troxel*, we distill the following constitutionally based principles that a trial court should also follow in determining and quantifying grandparent visitation rights under § 25-409. First, the court should recognize and apply a presumption that a fit parent acts in his or her child's best interest in decisions concerning the child's care, custody, and control, including decisions concerning grandparent visitation. See *Troxel*, 530 U.S. at 68-69, 120 S. Ct. at 2061; 147 L. Ed. 2d at 58-59; *Jackson*, 199 Ariz. 306, ¶13, 18 P.3d 100, ¶ 13; Crafton, 752 N. E.2d at 96, 98. That presumption, however, is rebuttable. See *Troxel*, 530 U. S. at 87, 120 S. Ct. at 2071, 147 L. Ed. 2d at 69 (Stevens, J. , dissenting); *Crafton*, 752 N.E.2d at 96, 98; cf. *In re United States Currency of $315,900.* 00, 183 Ariz. 208, 212-13 n.7, 902 P.2d 351, 355-56 n. 7 (App. 1995) (presumption is not evidence that can or should be weighed but, rather, only dictates the order and burden of proof). As the

Indiana appellate court stated in *Crafton*, " a grandparent seeking visitation has the burden of rebutting the presumption that a decision made by a fit parent to deny or limit visitation was made in the child's best interest. " 752 N.E.2d at 96-97.

¶18 Second, a trial court must consider and give "some special weight" to a fit parent's determination of whether visitation is in the child's best interest and give "significant weight" to a parent's voluntary agreement to some visitation, albeit not as much visitation as the grandparent desires. *Troxel*, 530 U.S. at 70-72, 120 S. Ct. at 2062-63, 147 L. Ed. 2d at 59-61. See also *Jackson*, 199 Ariz. 306, ¶¶13, 14, 18 P.3d 100, ¶ ¶13, 14; *Crafton*, 752 N.E.2d at 96-98. The amount of weight a trial court should place on these factors is not entirely clear because *Troxel's* plurality opinion "does not describe precisely the extent to which [a parent's decision on visitation] will control" and "left that issue for development on a case-by-case basis." *Harrington v. Daum*, 18 P.3d 456, 460 (Or. App. 2001); cf. *In re Marriage of Harris*, No. D036144, 2001 WL 1113062, at *6, *12 (Cal. Ct. App. Sept. 24, 2001) (holding that, although *Troxel* does not so specifically require, California Constitution requires "grandparent seeking visitation rights over the objection of a fit parent to show by clear and convincing evidence that the parent's decision would be detrimental to the child").

¶19 Nonetheless, the evidentiary presumption and weight requirements, in our view, should

help avoid visitation orders "based solely on the judge's determination of the child's best interests" or on the judge's "mere disagreement" with a fit parent's choice. *Troxel*, 530 U.S. at 12 67-68, 120 S. Ct. at 2061, 147 L. Ed. 2d at 58. See Susan Tomaine, Comment, Troxel v. Granville: Protecting Fundamental Parental Rights While Recognizing Changes in the American Family, 50 Cath. U. L. Rev. 731, 781-83 (2001). In sum, the foregoing principles affect but do not necessarily control a trial court's determinations of "best interests of the child" and "reasonable [grandparent] visitation rights" under our statute. § 25-409(A).

¶20 "If possible, we construe a statute so as to avoid rendering it unconstitutional, resolving any doubts in favor of its constitutionality. " Ramirez, 193 Ariz. 325, ¶20, 972 P.2d 658, ¶20. When, as here, the issue is whether a statute was or may be constitutionally applied, we must attempt "to give it a reasonable and constitutional meaning." *Hansson v. State Bd. ofDental Examiners*, 195 Ar iz. 66, ¶11, 985 P.2d 551, ¶11 (App. 1998). With those concepts in mind, we conclude that a trial court must not only apply "the statute as written," but also must afford a fit parent the procedural and evidentiary safeguards discussed above in order to apply § 25-409 in a constitutionally acceptable manner. *Jackson*, 199 Ariz. 306, ¶14, 18 P.3d 100, ¶14. Superimposing those safeguards on § 25-409 is compatible with the statute and alleviates any constitutional concerns in applying it.

¶21 In granting the mother's post-Troxel motion for reconsideration and vacating its prior grandparent visitation order, the trial court noted that it essentially had used the "same trial procedures . . . as were used by the trial judge in *Troxel.*" Based on the various reasons specified in its order, see ¶5, supra, the trial court concluded that it had unconstitutionally applied § 25-409 in a manner that "violated the mother's fundamental right to parent her child without state interference. " Because we have no way of knowing how the trial court weighed the evidence and allocated the burdens of proof at trial, we must defer to its hindsight on such matters and have no basis for questioning the court's reasons for vacating its prior or der. Therefore, we affirm that aspect of the trial court's August 2000 ruling.

¶22 But we need not defer to the trial court's ultimate ruling, which presumably was based on its reading of *Troxel*, that " [t]he issue of grandparent visitation is left in the discretion of the mother." We cannot discern either from the court's order itself or from the record precisely what that ruling means in practical terms. The court's original order granting visitation noted that the mother "object[ed] to the proposed schedule [of the court-appointed psychologist] and urge[d] a more limited visitation arrangement." Similarly, the trial court noted in its subsequent order that the mother had "wanted the issue of visitation with the grandparents to be her decision alone" and that the court had not

"credit[ed] the mother with offering visitation to the grandparents, though less than they wanted." Neither the trial court's orders nor the trial-transcript, however, specifies the amount or frequency of grandparent visitation the mother was agreeable to at the time of trial or five months later, when the trial court reconsidered and vacated its visitation order based on *Troxel*. Nor, of course, does the record reflect what frequency or amount of grandparent visitation the mother has allowed, if any, in her "discretion" from August 2000 to the present.

¶23 Apparently, unlike this case, the parents in *Dodge I* and *Jackson* sought to discontinue or terminate grandparent visitation rights altogether. *Dodge I*, 195 Ar iz. 119, ¶9, 985 P.2d 604, ¶9; *Jackson*, 199 Ariz. 306, ¶3, 18 P.3d 100, ¶3. But, even assuming the mother here merely sought to restrict, not totally preclude, grandparent visitation, we do not necessarily agree with the dictum in *Jackson* that § 25-409 "applies only in cases in which a parent has denied visitation, not merely limited it." 199 Ar iz. 306, ¶14, 18 P.3d 100, ¶ 14. Neither § 25-409(C)(1) through (C)(4), which the Jackson court cited, nor any other Arizona decision clearly imposes any such condition on grandparent visitation. We see no valid distinction between a parent who seeks to refuse grandparent visitation altogether and one whose offer to permit such visitation is so limited or unreasonable that it essentially fails to "foster[] relationships between grandchildren and their

grandparents." *Dodge I*, 195 Ariz. 119, ¶27, 985 P.2d 604, ¶ 27.

¶24 In our view, a parent's willingness to allow some visitation is but one factor to consider under § 25-409. As noted above, a trial court should give "significant weight" to that fact. *Troxel*, 530 U.S. at 72, 120 S. Ct. at 2063, 147 L. Ed. 2d at 60. See also Crafton, 752 N.E.2d at 86. As long as the tr ial court extends the aforementioned safeguards and makes the necessary findings pursuant to § 25-409, however, the statute permits the court to grant "reasonable [grandparent] visitation rights," which may vary from those agreed to or urged by the parent. § 25-409(A).

¶25 Under the circumstances, we deem it appropriate to remand the case for the trial court to conduct a further evidentiary hearing to determine whether to grant grandparent visitation and, if so, its extent or frequency. In reaching that same result, the Indiana court in *Crafton* stated:

> [T]he Record in this case has not been adequately developed in order to allow [the grandparent] a fair opportunity to present evidence to attempt to rebut the presumption that [the mother's] decision was in her children's best interest. At the time of the original hearing on [the grandparent's] Petition for Grandparent Visitation, [she] was unaware that she was required to disprove this presumption, so it would be inequitable to judge whether she has-

> rebutted the presumption based on the evidence presented at the prior hearing. Moreover, as it has been over three years since the original hearing, to make a proper determination under the requirements of *Troxel*, the trial court needs to hear evidence regarding the current situation between the parties and the children, [the mother's] currentdecision with regard to grandparent visitation (assuming her fitness is not at issue), and whether or not [the mother] is willing to voluntarily allow [the grandparent] any access to the children. Evidence on all of these issues is necessary if the trial court is going to apply the appropriate weight to evidence as required by *Troxel*. It would be unfair to the parties to ask the trial court to determine these issues based on a Record that was not made with these issues in mind. 752 N.E.2d at 98.

¶26 Because those same considerations apply here, we subscribe to that approach. Other than an unverified petition for contempt that the grandparents filed in June 2000 and that the

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[6]We strongly encourage the parties to stipulate to as many facts as possible on remand, including uncontroverted facts presented in the March 2000 trial, to avoid a needless waste of time in presenting repetitive evidence on undisputed matters.

trial court denied in its August ruling, nothing in the record specifically reflects how much or how little visitation actually was provided between April and August. Nor does the record reflect how or why the trial court ultimately determined to leave grandparent visitation solely in the mother's discretion or what evidence supported that ruling.

¶27 Under these circumstances, unlike some other appellate courts, we are unable to conclude as a matter of law that the grandparents did not carry their burden of rebutting the presumption of parental primacy or could not do so if given the opportunity. See *Harris*, 2001 WL 1113062, at *14; *Kyle O. v. Donald R.*, 102 Cal. Rptr. 2d 476, 487 (Ct. App. 2000); *State v. Paillet*, 16 P.3d 962, 971 (Kan. 2001). Accordingly, we affirm the trial court's order of August 28, 2000, except for the aspect that left the issue of grandparent visitation solely "in the discretion of the mother." We vacate that portion of the order and remand the case to the trial court for further proceedings consistent with this decision. [6]

¶28 In our discretion, we deny the mother's request for an award of attorney's fees on appeal because she cites no basis for the request. See Ariz. R. Civ. App. P. 21(c), 17B A.R.S.; *In re Wilcox Revocable Trust*, 192 Ar iz. 337, ¶21, 965 P.2d 71, ¶21 (App. 1998) ("We will award no attorney's fees where no basis for the award is cited to us."). See also *Kromko v. Superior Court*, 168 Ar iz. 51, 61, 811 P.2d 12, 22 (1991); cf. A.R. S. § 25-324 (permitting court to award attorney's

fees on appeal under specified circumstances).

JOHN PELANDER, Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Presiding Judge

M. JAN FLÓREZ, Judge

Denial of Petition for Review by the Arizona Supreme Court

Supreme Court
State of Arizona
402 Arizona State Courts Building
1501 West Washington Street
Phoenix, Arizona 85007-3291

Noel K. Dessaint
Clerk of the Court

Kathleen E. Kemply
Chief Deputy Clerk

February 14,2002

RE: MONTIE McGOVERN/ANN McGOVERN v TAMMY McGOVERN
Arizona Supreme Court No. CV-01-0410-PR
Court of Appeals Division Two No. 2-CA-CV 01-0016
Pima County Superior Court No. D-125189

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on February 12, 2002, in regard to the above-referenced cause:

ORDERED: Petion for Review – Denied
Record returned to the Court of Appeals, Division Two, Tucson, this 15th day of February, 2002

Noel K Dessaint, Clerk

TO:
Cheryl K Copperstone
Paul S Rowley, Roberts & Rowley LTD
Jeffery P Handler, Acting Clerk, Court of Appeals
Division Two, Tucson
Lexis-Nexis
West Publishing Company

Denial of Stay of Mandate Pending United States Supreme Court action on Petition for Writ of Certiorari

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COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ORDER

2 CS-CV 2002-0016
Department A
Pima county
Cause No. D-125189

RE: MCGOVERN v. MCGOVERN

Pursuant to Application for Stay of Issuance of Mandate, RESPONSE TO APPELLANT'S REQUEST FOR MANDATE, and REQUEST FOR MANDATE,

ORDERED: Application for Stay of Issuance of Mandate is denied.

Judges Florez and Pelander concurring.

DATED: March 26,2002

J. William Brammer, Jr.
Presiding Judge

Copies to:

Cheryl K Copperstone
252 West Ina Rd., Suite 203
Tucson, AZ 85704

William W. Wissler
5055 E. Broadway, Suite B-204
Tucson, AZ 85711

Attention: Paul Rowley
ROBERTS & ROWLEY, LTD.
63 East Main Street, Suite 501
Mesa, AZ 85201